

**TOWN OF DAY ZONING BOARD OF APPEALS
MINUTES – REGULAR MEETING
DECEMBER 21, 2009**

Members Present: Ken Johnsen, Chairman **Members Absent:** None
Judy Traeger
Dave Davidson
Pat Volpe
Hank Lang
David Avigdor, Town Attorney

Motion by Dave Davidson, seconded by Board Member Traeger to approve the minutes of the November 16, 2009 meeting. Ayes: Johnsen, Traeger, Volpe, Davidson. Abstention: Lang. Carried: 5-0.

**Old Business: Interpretation – Determination of Temporary Structures
09-04ZBA**

Chairman Johnsen reopened the discussion of an application by Code Enforcement Officer Metzler for an interpretation of a temporary structure. Each Board Member was provided with the definition of a temporary structure from the proposed Zoning Ordinance of the Town of Edinburg which states “Temporary Structure – An accessory structure that is not permanent by nature (i.e. without footings, foundation or permanent attachment to the land) and is by design, capable of being dismantled (i.e. tents, portable car ports, etc.) and reassembled.”

Chairman Johnsen stated the purpose of this discussion is to determine what would be considered temporary or permanent structures and not to consider what has occurred in the past. Board Member Davidson read the definition of a structure from the Town of Day Zoning Law which states “Structure – Anything constructed or erected, the use of which requires location on or in the ground, or attachment to something having location on or in the ground other than public utility poles, wires and related equipment.”

Board Member Lang stated he has researched case law and the Town of Day definition is the most commonly used definition. While the definition of a temporary structure from the Town of Edinburg may be more descriptive, it is not in effect within the Town of Day and the Board should consider what is included in the Town of Day Zoning Law. Chairman Johnsen stated he wished to include both definitions in the discussion. Board Member

Davidson stated the word “temporary” does not appear in the Town of Day Zoning Law and did not believe the Town of Edinburg defined a “temporary structure” or how zoning codes relate to a “temporary structure”. He agreed with Board Member Lang.

Chairman Johnsen stated in the past CEO Metzler has been permitting the structures as depicted in the information (attached) provided to him by the property owner as temporary which could be disassembled and moved. A citizen of the Town of Day inquired if this type of building was a permanent structure and should the law be amended due to the fact temporary may not pertain to this type of building. Board Member Lang stated he would take exception to the word “permanent” because it is not in the zoning law and this Board should be considering whether it is a structure. He further stated CEO Metzler was referring to building code. CEO Metzler stated his question is: Are these structures or temporary buildings and if they are deemed to be structures as defined by zoning law and would be bound by the restrictions and requirements of a structure. Town Attorney Avigdor stated the Board cannot construe State Building Code but can construe Town Zoning Law.

Board Member Lang stated pursuant to Town Attorney Avigdor’s statement, this Board would be confined to what is stated in Town of Day’s Zoning Law. Chairman Johnsen stated he is not satisfied that he is clear on what would define a structure. Board Member Lang stated in his opinion, it would be a structure as defined by Zoning Law. Chairman Johnsen disagreed stating the discussion is not limited to a single instance but a determination of how a structure would be defined. CEO Metzler stated would this building as depicted in the brochure be deemed temporary or a structure. Town Attorney Avigdor stated the Board’s power to give a determination would be granted through the Town of Day Zoning Law upon application for an interpretation. He further stated CEO Metzler’s application is for an interpretation of the building(s) depicted in the brochure as being a structure(s). The interpretation may have precedential value which will affect similar structures in the future. The question before the Board is: Under our Zoning Law, is that a structure?

Board Member Davidson stated as he reads Zoning Law, it clearly is a structure. Board Member Traeger stated she would consider it similar to a shed without a concrete pad. Board Member Davidson stated the definition states “on the ground” and from that perspective, he cannot think of anything which would not be a structure. Board Member Lang stated this could have far reaching

implications in that a fence is considered a structure. He further stated because the laws are written so broadly, this Board would have the power to interpret what would be classified as a structure for the purposes of application under Town of Day Zoning Law. Board Member Lang stated that while Town Attorney Avigdor did state this decision would have precedential weight; this Board could confine their decision to this particular structure. The precedent would be limited to this particular type of structure and not encompass the whole gamut of structures. Board Member Davidson stated that was also his point. Chairman Johnsen stated he was not aware it was specifically passing judgment on this particular structure but rather structures in general that were of a temporary or permanent nature.

CEO Metzler stated that while the Board was looking at the picture on the first page of the brochure, the structures that he had in mind are encompassed in that entire paperwork which was submitted to the Board as part of the application. Chairman Johnsen inquired of CEO Metzler what does not require a permit. CEO Metzler stated a shed built less than 100 square feet. Board Member Davidson inquired if this was a building code issue. CEO Metzler stated it was a zoning issue as well. Board Member Davidson stated he did not find that issue contained within Zoning Law. CEO Metzler stated he did not know the specific section of law where this was contained. Under building code, a shed under 144 square feet does not require a permit but under zoning law, the requirement would be less than 100 square feet and would be free standing (i.e. not a porch connected on a house or an addition).

Chairman Johnsen stated a metal building located on a mechanic's parcel is larger than 100 feet and did not require a permit. CEO Metzler stated he determined it to be a temporary structure. Chairman Johnsen stated that brings the discussion back to temporary structures. Board Member Lang stated the terms "temporary" or "permanent" have no bearing, only the term structure. Board Member Volpe stated he believed this temporary structure was erected on piers which were into the ground. CEO Metzler stated this was a leveling process and also was the type of structure which had been allowed under the designation of temporary. It is this type of disagreement which has only occurred very recently which precipitated his application for an interpretation.

Town Attorney Avigdor stated when an issue comes before a Board or court, typically the issue has been dealt with previously. CEO Metzler stated these types of buildings have come before him numerous times in the past and this is the first challenge which he

has received and it needs an interpretation. Town Attorney Avigdor stated the question is not what was done before which is not precedential. He further stated CEO Metzler allowed a certain “thing” to be placed and is now seeing that it has become a question that is worthy of an interpretation and is coming to this Board as a higher authority to determine which is correct. He further stated if it were a question of law, he and CEO Metzler could determine the status. However, it is a matter of judgment and if referred to a five-member Board for determination. If one exists or not at a mechanic’s site, does not bind this Board’s decision. The Board must determine if what was submitted fits the description of a structure.

Chairman Johnsen stated in order to determine that, the Board would need to know what was permitted in the past without requiring a permit and does this exceed those bounds. He further stated in his opinion he believe it would. Board Member Lang stated this matter has never come before this Board previously and Chairman Johnsen may wish to form his personal judgment based on what has been permitted in the past but this Board must determine whether this is a structure or not and would not be bound by what is existing within the Town. All Board Members have physically observed the structure in question. Chairman Johnsen stated in his opinion, it does look like a structure.

CEO Metzler stated these were allowed in the past because they were delivered in a box, assembled for a temporary structure, placed temporarily and used temporarily. Board Member Volpe stated some were placed on sono tubes. CEO Metzler stated these were sited on top for balancing. CEO Metzler stated these “buildings” can be disassembled and removed from the site. Board Member Davidson stated in reviewing zoning law, the word “temporary” does not occur. CEO Metzler stated these “buildings” were originally small tents and evolved into larger tents covered with canvas, next had metal roofs and currently have metal sides. He questions if they are truly temporary. Board Member Volpe stated if it is not a tree or boulder, it would be considered a structure if constructed with man made materials. Public participation was requested by Kenneth O. Johnsen but was not allowed. Board Member Lang stated free standing sheds constructed of wood under 100 feet would be allowed without a permit so Board Member Volpe’s analogy may not be helpful in making a determination. Board Member Davidson stated he was in agreement with Board Member Lang. He further stated if the Town Board found that this Board construed the issue too tightly, they would create a code to change the law accordingly. Chairman

Johnsen stated he was not satisfied that he understood what determines when a permit is necessary.

Town Attorney Avigdor stated it would be a two step process: There is a definition and a determination of which structures require permits. He further stated CEO Metzler is correct that structures under 100 square feet do not require permits. For example, in Section 4.2, Lakefront Residential Zone states "Accessory Structure Setbacks: 15 feet (except that accessory structures are subject to shoreline setbacks if they are 100 square feet or larger, and except that accessory structures of any size are subject to the same front yard setback as principal buildings). He stated this is the section of zoning law which determines the requirement of permits. Something may be a structure and only be 3 square feet and would be considered a structure but not require a permit due to its small size. While this Board is focusing on Town of Day Zoning Law, there are similar APA definitions. For example, anything built on the earth is a structure and structure setbacks only apply to buildings over 100 square feet. The question of what would be permitted is the secondary question. This example is clearly over 100 square feet. There may be similar "things", i.e. aluminum framed, covered with fabric with walls which are under 100 square feet. The question before this Board is the submitted brochure from CEO Metzler and attached information. Whether it requires a permit would be determined by CEO Metzler.

Chairman Johnsen stated in looking at this building in the submitted brochure and observing the actual building at the site, while it is referred to as temporary, it still appears to be permanent. Town Attorney Avigdor stated that while CEO Metzler previously had determined if a building arrives in a box which can be disassembled and removed, he may or may not have been correct in that determination. The Comprehensive Plan Committee may create a definition of a temporary structure but currently there is none. "Something" is either a structure or it is not and a definition of a structure does exist in zoning law. To construct or erect imply permanency. For example, a bicycle put in a driveway does not imply it was constructed or erected but to sink posts and attached it to the bicycle brings it to the level of permanency. The terms "on or in the ground", which would give the building stability, does not make a difference under the ordinance. The question is "is this constructed or erected". Board Member Volpe stated a tent can be erected and therefore there would be no difference between "constructed" or "erected". Town Attorney Avigdor stated no matter how narrowly the Board defines structure, regardless of the color or materials it is constructed of, CEO Metzler will find that it

is too similar to the submitted example and deem it a structure subject to setbacks requirements, etc. However, if a building is half the size of this example and CEO Metzler is comfortable making his own determination of whether or not it is a structure, he will do so. If he is not, he will appear before this Board and ask for an additional determination. He agrees that it should be narrow and if by making a narrow decision, it requires a reappearance of CEO Metzler, the sum of these proceedings becomes a jurisprudence regarding a topic. This would explain why a narrow decision would be appropriate at this time.

Discussion ensued on how to formulate the motion with Town Attorney Avigdor stating language to be used and disagreement on the part of Board Member Davidson on specific wording. Town Attorney Avigdor withdrew his participation and Board Member Davidson formulated the following motion.

Motion by Dave Davidson, seconded by Judy Traeger, that the sheds and garages contained in the documents submitted by CEO Metzler are structures under Town of Day Zoning Law.

Board Member Lang would like to modify the motion by adding: To include the data submitted by CEO Metzler and restricted to those specific documents which were submitted at the Zoning Board Meeting on November 16, 2009 and attached to the Resolution.

Chairman Johnsen inquired if the motion was limited to the photographs attached to the brochure which was the building which was actually erected or both buildings on the first page of the brochure which shows two different styles of the building (i.e. one with sides and a door and one without sides or a door).

Town Attorney Avigdor stated he was attempting to be more specific and narrow in the formulating of the motion but this is the motion made and seconded and any additions must be agreed upon by the Member who made the motion (Davidson) and the Member who seconded it (Traeger).

Board Members Davidson and Traeger agreed to the modification of the motion by Board Member Lang.

Motion by Dave Davidson, seconded by Judy Traeger, that the sheds and garages contained in the data submitted by CEO Metzler and restricted to those specific documents which were submitted at the Zoning Board Meeting on November 16, 2009 and attached to the Resolution would be structures under Town of Day Zoning Law. Ayes: Johnsen, Traeger, Davidson, Volpe, Lang. Carried: 5-0.

Chairman Johnsen stated he would recommend this issue be referred to the Planning Board for more specific determination of what would be a permissible and what is not. Town Attorney Avigdor stated it would not be referred to the Planning Board because just as this Board as specific jurisdictions, so would the Planning Board. The Town Board would be the ultimate authority to amend the law. Currently there is a Comprehensive Review Committee which is specifically reviewing the Town of Day Land Use Laws and they could include this in their proposed plan.

Chairman Johnsen stated referring to Article 11, Section D “The concurring vote of a majority of all members of the Board of Appeals shall be necessary to reverse any order, requirement, decision or determination of the Code Enforcement Officer or to decide in favor or an applicant in any matter...” which he stated would give the Zoning Board a specific power to determine what should be the regulation. Board Member Lang disagreed stating this section of law refers to an applicant submitting an application for a variance after receiving a denial for a building permit. He further stated this Board cannot make law. Chairman Johnsen inquired if the Town Board should determine the perimeters for which CEO Metzler should allow construction or require a variance. Town Attorney Avigdor stated in this case before the Board, there is not a decision of the Code Enforcement Officer but a request for an interpretation. When the Board receives a request for a variance, it is a denial by the Code Enforcement Officer and it would come before this Board. If a variance is granted, this Board is reversing CEO Metzler’s determination. To clarify Article 11, Section D, on variance applications, a majority is necessary to make a decision. Town of Day Zoning Law does not speak to who would have the authority to amend the law due to New York State Law states Town Board is the legislature of the town. Because this is a law, it would require an act of legislature.

CEO Metzler stated in the past if an individual believed there may be a discrepancy in part of the law, the Town Board would review and refer it to the Planning Board for closer scrutiny or form a subcommittee to review it with a referral back to the Planning Board for their approval. It then moved to the Town Board to hold public hearings and could result in amendment. Town Attorney Avigdor stated the Planning Board would have no jurisdiction on these matters of law, however, the Town Board can request their opinion on the matter.

Board Member Traeger stated this structure would be treated like any other structure subject to setback requirements. CEO Metzler

stated from this time forward if this type of structure does not pass building code and cannot meet zoning standards, they will not be permitted. If he receives a proposal for a canvas covered structure which he would determine is totally different from this application, he will once again request a determination from this Board.

CEO Metzler presented a list of all the building permits for 2009 for the Board's review. Board Members will be furnished a copy upon request. Board Member Davidson requested a copy.

New Business: None

Correspondence: The Secretary requested any registration forms for the annual Saratoga County Planning Conference. These registrations would be due no later than January 4th.

Board Members were also provided with vouchers for submission as soon as possible.

Secretary's Report: The GIS training to be provided by Jason Kemper, Director of Saratoga County Planning has been scheduled for Monday, February 22nd at 7 p.m.

There is a laptop computer located in the meeting room for Board Members use which will contain all information from the County website to be provided by Director Kemper. CEO Metzler stated he will also load a Viewshed Map and Zoning Map.

Public Participation: None.

Motion by Board Member Volpe, seconded by Hank Lang to adjourn the meeting at 7:40 p.m. Ayes: Johnsen, Traeger, Volpe, Lang, Davidson. Carried: 5-0.

Respectfully submitted,

Diane Byrne
Secretary